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IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE EASTERN DISTRICT OF VIRGINIA  
 RICHMOND DIVISION

- - - - - X  
 In re: : Chapter 11  
 :  
 CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :  
 :  
 Debtors. : Jointly Administered  
 - - - - - X

**DEBTORS' MOTION FOR ORDER UNDER BANKRUPTCY CODE SECTIONS  
 105, 363, 365 AND 503 AND BANKRUPTCY RULES 2002, 6004  
 AND 6006 (A) AUTHORIZING SELLER TO ENTER INTO AGREEMENT  
 FOR SALE OF CERTAIN REAL PROPERTY IN BALTIMORE, MARYLAND  
 SUBJECT TO HIGHER OR OTHERWISE BETTER BIDS,  
 (B) APPROVING TERMINATION FEE IN CONNECTION THEREWITH,  
 (C) APPROVING SALE OF REAL PROPERTY FREE AND CLEAR OF  
 ALL INTERESTS, (D) APPROVING ASSUMPTION, ASSIGNMENT AND  
 SALE OF CERTAIN UNEXPIRED LEASES OF NON-RESIDENTIAL REAL  
 PROPERTY FREE AND CLEAR OF ALL INTERESTS AND  
 (E) GRANTING RELATED RELIEF**

Circuit City Stores, Inc. (the "Seller," and

collectively with the debtors and debtors in possession in the above-captioned jointly administered cases, the "Debtors")<sup>1</sup> hereby move (the "Motion"), pursuant to sections 105, 363, 365 and 503 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order (A) authorizing the Seller to enter into an agreement with the Purchaser (as defined herein) for the sale (the "Sale") of certain of the Seller's real property located at 8823 Pulaski Highway, Baltimore County, Maryland (the "Property"), a copy of which is attached as Exhibit A to the Sale Order (the "Agreement")<sup>2</sup>, subject to higher or

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, Inc. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address was 9950 Mayland Drive, Richmond, Virginia 23233 and currently is 4951 Lake Brook Drive, Glen Allen, VA 23060.

<sup>2</sup> Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Agreement.

otherwise better proposals, (B) approving the Termination Fee (as defined below) in connection therewith, (C) approving the Sale free and clear of all Liens (as defined below), (D) approving the assumption, assignment and sale (the "Assignment") of the Leases (as defined below) associated with the Property free and clear of all Liens and (E) granting related relief. In support of the Motion, the Seller respectfully represents as follows:

#### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105, 363, 365 and 503 and Bankruptcy Rules 2002, 6004 and 6006.

## **BACKGROUND**

### **A. The Bankruptcy Cases.**

3. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107 and 1108.

5. On November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases.

6. On January 16, 2009, the Court authorized the Debtors, among other things, to conduct going out of business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency Agreement") between the Debtors and a joint venture, as agent (the "Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors remaining stores. As of

on or about March 8, 2009, the going out of business sales concluded.

**RELIEF REQUESTED**

7. By this Motion, the Seller seeks an order (A) authorizing the Seller to enter into the Agreement in connection the Sale of the Property, subject to higher or otherwise better proposals, (B) approving the Termination Fee in connection therewith, (C) approving the of the Sale of the Property free and clear of all interests, (D) approving the Assignment of the Leases free and clear of all interests and (E) granting related relief (the "Sale Order").

8. As more fully set forth below, after a comprehensive review, the Seller believes that the Sale of the Property and the Assignment of the Leases represent its best opportunity under the circumstances to maximize the value of the Property and the Leases. Therefore, the Sale of the Property and Assignment of the Leases are in the best interests of its estate and stakeholders.

**BASIS FOR RELIEF**

**A. The Property and the Leases.**

9. The Seller owns the Property located in Baltimore, Maryland, constituting the Golden Ring shopping center. In addition to operating a retail store on the Property, the Seller leases certain portions of the Property to two different tenants (the "Tenants"): the Seller is party to a lease dated March 23, 1995 with NTW Inc and the Seller is party to a lease dated July 13, 1999 with Boat America Corporation (together, the "Leases," copies of which are attached as Exhibit A to the Agreement). Accordingly, the Sale of the Property would be subject to the Leases, which would be assigned to any purchaser of the Property.

**B. Events Leading To The Sale.**

10. In light of the failure to obtain any feasible going concern bids and the decision to liquidate the Debtors' inventory through going-out-of-business sales, as described above, the Seller has been left with various assets -- including the Property -- for which it has no remaining use. In contrast, the sale of such assets, including the Sale of the Property,

would result in significant proceeds for the Seller's estate and creditors.

11. Since at or about the time the going-out-of-business sales were commenced, the Seller, along with its real estate advisor, DJM Realty, LLC ("DJM"), has been marketing the Property. As a result of these marketing efforts, the Seller received various proposals to purchase the Property. Upon reviewing these proposals, the Seller determined that the proposal submitted by the Purchaser was considerably higher or otherwise better than the alternate proposals received. Thus, the Seller elected to proceed with the Sale of the Property to the Purchaser.

**C. The Agreement.**

12. On February 19, 2009, Seller entered into a contract (the "Initial Contract") with VEI Circuit LLC (the "Purchaser") for the Sale of the Property. The Purchaser initially exercised its option to terminate the Initial Contract prior to the expiration of its due diligence period pursuant to a right to do so set forth in the Initial Contract. Subsequently, the Seller and the Purchaser have agreed

to reinstate the Initial Contract with certain amendments and modifications thereto, including an extension of the due diligence period, provision for the Debtor to obtain an updated environmental assessment of the Property, with the costs of such assessment to be deducted from any break up fee payable to the Purchaser, and an adjustment in the Purchase Price. (the Initial Contract, as so amended and modified, the "Agreement").<sup>3</sup>

13. Pursuant to the Agreement, the Seller would sell the Property to the Purchaser for \$4.65 million (the "Purchase Price").

14. The significant terms of the Agreement are as follows:<sup>4</sup>

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<sup>3</sup> More than 15 years ago, certain areas of the Property were deemed to be contaminated, clean-up was performed and documentation reflecting the successful elimination of contamination was filed with the state of Maryland. The Purchaser wished to obtain copies of these records but was unable to obtain them because they had been filed so many years ago. Consequently, the only way for the Seller to provide the Purchaser with a record of the environmental status of the Property was to have a new environmental assessment completed. As part of the reinstatement of the Agreement, the parties agreed upon a procedure for obtaining a new environmental assessment. The assessment was completed and delivered to the Purchaser on May 20, 2009, showing that the previous contamination area was in fact remediated in accordance with applicable law so that the presence of contaminants was below the level requiring further action.

<sup>4</sup> In the event of any discrepancy between the Agreement and this summary of the Agreement, the provisions of the Agreement are controlling.



(a) General Terms. The Purchaser would acquire the Property, consisting solely of the Seller's right, title and interest in and to the property located at 8823 Pulaski Highway, Baltimore County, Maryland, comprising approximately 7.389 acres, together with (i) all rights and appurtenances pertaining to such land, (ii) all buildings, structures and other improvements on said land and (iii) electrical, mechanical, air conditioning and other fixtures attached thereto. The Property will not include any lifts or racking located in any of the buildings or any personal property, inventory, equipment or trade fixtures of the Tenants of the Leases. Seller would assign each of the Leases to Purchaser.

(b) Sale and Assignment. The Property would be sold free and clear of all liens, charges, pledges, security interests, conditional sale agreements or other title retention agreements, leases, mortgages, security interests, options, or other encumbrances (including the filing of, or agreement to give, any financing statement under the Uniform Commercial Code of any jurisdiction) and any monetary amounts which are secured by any lien (collectively, the "Liens"), except for (i) the rights the Tenants under the Leases, (ii) liens for real property taxes that are not yet due and payable, (iii) zoning ordinances, building codes and other land use laws and applicable governmental regulations, (iv) all covenants, agreements, conditions, easements, restrictions and rights, whether of record or otherwise and (v) any and all matters that would be shown by a physical inspection of the Property (collectively, the "Permitted Encumbrances").

(c) Bankruptcy Court Approval. The Sale of the Property would be subject to approval by this Court and competitive bidding pursuant to the Bidding Procedures (as defined below).

(d) Documentation. The Sale would be effected pursuant to the Agreement and related documentation.

(e) Purchase Price. The Purchase Price to be paid by the Purchaser for the Property would be \$4.65 million.

(f) Letters of Credit Escrow. In accordance with the Agreement, the Purchaser has previously delivered irrevocable letters of credit (the "Letters of Credit") payable to Seller in the amount of \$500,000 to an escrow agent. If the Agreement is terminated prior to closing of the Sale and Assignment (the "Closing") because of the Purchaser's breach of the Agreement (on the terms as provided in the Agreement), the Seller would be entitled to draw upon the Letters of Credit as the Seller's sole recourse in such event.

(g) Representations And Warranties. Pursuant to the Agreement, the Seller would provide certain standard representations and warranties relating to the Sale of the Property and the Purchaser would provide representations and warranties generally standard in a transaction of this type. The representations and warranties of the Purchaser survive indefinitely following the Closing or the termination of the Agreement. The representations and warranties of the Seller shall expire and be extinguished at the Closing.

(h) Termination. The Agreement could be terminated prior to Closing in the following circumstances: (i) by Purchaser, if an action is initiated to take any material portion of the Property by eminent domain proceedings, (ii) by Purchaser, in the event of damage to the Property exceeding \$200,000 occurring during the period after the date of the Agreement and prior to Closing, if Seller does not repair such damage, (iii) by Purchaser, in the event that Seller shall fail to consummate the transactions contemplated by the Agreement, (iv) by Seller, in the event that Purchaser shall fail to comply with the Agreement and (v) by Seller, in order to permit Seller to accept a higher or better offer for the Property pursuant to the Bidding Procedures.

**D. Termination Fee.**

15. The Seller has agreed to pay the Purchaser a break-up fee of \$20,000.00, less costs incurred by the Seller to obtain the environmental site assessment (the "Termination Fee") if, and only if (i) Purchaser is not in breach of or default under the Agreement and (ii) the Seller consummates the Sale of the Property with a higher or otherwise better bidder following the Auction (as defined herein) and approval by the Bankruptcy Court.

16. The Purchaser has expended, and likely will continue to expend, considerable time, money, and energy pursuing the Sale and has engaged in arm's length and good faith negotiations regarding a possible sale of the Property. The Agreement is the culmination of these efforts.

17. In recognition of this expenditure of time, energy, and resources, the Seller has agreed to the Termination Fee. Specifically, the Agreement provides for, and the Seller respectfully requests that the Sale Order approve, the Termination Fee payable by the Seller to the Purchaser in the amount of \$20,000.00,

less costs incurred by the Seller to obtain the environmental site assessment if the Seller terminates the Agreement to close an alternative transaction, so long as the Purchaser is not in breach of the Agreement.

18. The Seller believes that the proposed Termination Fee is fair and reasonable in view of (a) the analysis, due diligence investigation, and negotiation undertaken by the Purchaser in connection with the Sale and (b) the fact that the Purchaser's efforts would maximize the value of the Property and Leases for the benefit of all stakeholders, whether as a result of consummating the Sale pursuant to the Agreement or by generating a higher or otherwise better offer.

19. The Purchaser is unwilling to keep open its offer to purchase the Property under the terms of the Agreement unless this Court authorizes payment of the Termination Fee. Thus, absent entry of the Sale Order with approval of the Termination Fee, the Seller may lose the opportunity to obtain what it believes to be the highest or otherwise best offer for the Property. And, as described below, the Agreement is subject to

higher or otherwise better proposals. Approving the Termination Fee will thus commit the Purchaser to purchase the Property under the Agreement, and the Agreement would serve to start any additional bidding for the Property at a fair and reasonable purchase price.

20. Payment of the Termination Fee will not diminish the Seller's estate. The Seller would not expect to pay the Termination Fee unless it does so to accept an alternative proposal, which would result in even greater value to the Seller's estate and its stakeholders. This is particularly true given the Initial Minimum Overbid requirement (as defined below), which ensures that other proposals represent higher or otherwise better offers for the Property taking into account payment of the Termination Fee. The Seller thus requests that this Court authorize payment of the Termination Fee pursuant to the terms and conditions of the Agreement.

**E. The Bidding Procedures.**

21. To ensure the Seller receives the highest or otherwise best proposal for the Property, the Seller will entertain alternate proposals for the Sale

of the Property. The Seller accordingly requests that this Court order that any parties, including those parties that previously submitted proposals, who wish to submit an alternate proposal for consideration by the Debtors be required to do so by June 16, 2009 at 4:00 p.m. (ET) (the "Bid Deadline").

22. If the Seller receives any Qualified Bids (as defined herein), the Seller would hold an auction (the "Auction") on June 22, 2009 at 10:00 a.m. (ET) at the offices of Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, Wilmington, Delaware. The Seller will advise the Purchaser and all other parties that submitted a Qualified Bid (as defined below) of the Auction.

23. At the conclusion of any Auction, the Seller, in consultation with its advisors (and representatives of the Creditors' Committee), would determine the highest or otherwise best bid (the "Successful Bid").

24. Following the Auction, if any, the Seller intends to proceed with a hearing to approve the

Sale of the Property on June 23, 2009 at 2:00 p.m. (ET) (the "Sale Hearing").

25. If no Qualified Bids other than the bid of the Purchaser are received, the Seller would proceed with the Sale to the Purchaser following entry of the Sale Order. If the Seller receives additional Qualified Bids, then at the Sale Hearing, the Seller would seek approval of the Successful Bid, as well as the second highest or best Qualified Bid (the "Alternate Bid," and such bidder, the "Alternate Bidder"). A bid would not be deemed accepted by the Seller unless and until approved by the Court.

26. Following approval of the Sale to the Successful Bidder, if the Successful Bidder fails to consummate the sale for specified reasons, then the Alternate Bid would be deemed to be the Successful Bid and the Seller would be permitted to effectuate a sale to the Alternate Bidder without further order of the Court.

27. To ensure that only bidders with a serious interest in the purchase of the Property participate in the bidding process, the Seller would

only consider the "Qualified Bids" of "Qualified Bidders." To be considered a "Qualified Bid" and a "Qualified Bidder" for purposes of the Auction, the person or entity submitting the bid would be required to submit an offer by the Bid Deadline that includes:

- (a) an executed copy of the Agreement marked to show those amendments and modifications to the Agreement that the Qualified Bidder proposes (such modified Agreement, a "Marked Agreement"), including modifications to the Purchase Price, which price must be at least \$4,700,000.00 (the "Initial Minimum Overbid");
- (b) the potential bidder and the officer(s) or authorized agent(s) who will appear on behalf of such bidder;
- (c) a statement that the bid shall not be conditioned on the outcome of unperformed due diligence by the bidder or any financing contingency;
- (d) a good faith deposit (the "Good Faith Deposit") equal to at least \$500,000.00 in cash or in the form of a letter of credit;
- (e) an acknowledgement that the bidder's offer is irrevocable until two (2) business days after the closing of the Sale of the Property and Assignment of the Leases; and
- (f) an acknowledgement that, in the event the bidder is the Alternate Bidder, the bidder will proceed with the purchase of



the Property pursuant to the terms the Marked Agreement.

28. The Seller reserves the right to

(i) determine in its reasonable discretion (after consultation with representatives of the Creditors' Committee) which offer is the highest or otherwise best offer; (ii) reject at any time prior to the closing of a Sale and Assignment, without liability, any offer that the Seller in its reasonable discretion (after consultation with representatives of the Creditors' Committee) deems to be (x) inadequate or insufficient, (y) not in conformity with the requirements of the bidding procedures or applicable law or (z) contrary to the best interests of the Seller and its estate; (iii) re-open the Auction, (iv) withdraw the Property from the Auction, and (v) waive the requirements of any of the bidding procedures with respect to a potential or Qualified Bidder if the Seller determines in its business judgment (after consultation with representatives of the Creditors' Committee) it is in the best interests of its estate and creditors.

29. Objections to the Sale, if any, shall be filed and served no later than 4:00 p.m. (ET) on June 16, 2009.

#### **APPLICABLE AUTHORITY**

**I. APPROVAL OF THE TRANSACTIONS FOR THE SALE OF THE PROPERTY IS WARRANTED UNDER BANKRUPTCY CODE SECTION 363(b)(1).**

30. As set forth above, Bankruptcy Code section 363(b)(1) authorizes a trustee to "use, sell, or lease" property of the estate with the Court's approval. 11 U.S.C. § 363(b)(1). Assets of the Debtors may be sold outside of the ordinary course of business, pursuant to Bankruptcy Code section 363(b)(1), if a sound business purpose exists for doing so. In re WBQ P'ship, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995)(citing Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986)); see also In re W.A. Mallory Co., Inc., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997).

31. To satisfy the "sound business purpose test," the debtor must demonstrate that (1) a sound business reason or emergency justifies a pre-confirmation sale; (2) the sale was proposed in good faith; (3) the purchase price is fair and reasonable;

and (4) adequate and reasonable notice of the sale has been provided. In re WBQ P'ship, 189 B.R. at 102.

32. Based upon the results of their analysis, the Seller's management and advisors have concluded that the Sale of the Property pursuant to the Agreement or a higher or otherwise better offer would maximize the value of the Property for the Seller's estate. Maximizing asset value is a sound business purpose that warrants authorizing the proposed Sale.

33. The Sale of the Property will be subject to competing bids, thereby enhancing the Seller's ability to receive the highest or otherwise best value for the Property. Consequently, the fairness and reasonableness of the consideration to be received by the Seller will ultimately be demonstrated by a "market check" through the auction process, which is the best means for establishing whether a fair and reasonable price is being paid.

34. Moreover, the Seller proposes to provide adequate notice of the Auction and the Sale Hearing as set forth below. In light of the circumstances, such notice is reasonably calculated to provide timely and

adequate notice to the Seller's major creditor constituencies, those parties most interested in these cases, those parties potentially interested in bidding on the Property and others whose interests are potentially implicated by the proposed Sale and Assignment.

**II. THE SALE PROCESS IS REASONABLE AND APPROPRIATE.**

35. Bankruptcy Code section 363(b)(1) provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Moreover, Bankruptcy Code section 105(a) provides that "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

36. The disposition of the Property and Leases pursuant to the terms reflected in the Agreement resulted from the bids submitted for the Property, pursuant to a marketing process led by DJM. Conducting a marketing process through a third party broker represents an accepted method of selling property. Similar marketing processes have been approved in other

chapter 11 cases. See, e.g., Ready v. Rice, 2006 WL 4550188 at \*3 (D. Md. 2006); see also In re Reading Broadcasting, Inc., 386 B.R. 562, 571-72 (Bankr. E.D. Pa. 2008); In re King-Wilson, 1998 WK 737887 at \*4-5 (N.D. Cal. 1998).

37. In addition, bid procedures similar those Bid Procedures outlined above have been approved by this Court in this case. See Order Approving (I) Approving Bidding Procedures and (II) Setting Auction and Sale Hearing Dates in Connection With the Sale of Certain Real Property Located in Phoenix, Arizona, (D.I. 2401).

38. Finally, the other interested parties are provided with an opportunity to submit a higher or otherwise better proposal and, if necessary, the Seller will conduct an auction.

39. In light of the foregoing, the Seller submits that the Sale process is reasonable and appropriate.

**III. THE TERMINATION FEE REQUESTED HEREIN IS REASONABLE AND SHOULD BE APPROVED.**

40. In connection with Sale of the Property, the Court should authorize the Seller to pay the Termination Fee.

41. Agreements to provide termination fees and other bidding incentives are designed to compensate a potential acquirer who serves as a catalyst that may attract higher and better offers, and have been approved in bankruptcy to encourage bidding. See In re Ryan, 261 B.R. 867, 870 (Bankr. E.D. Va. 2001). Termination fees can be advantageous to both buyers and sellers because they encourage bidding to ensure that sellers receive the highest or otherwise best offer while compensating the buyer for the risk of being outbid. See id.

42. Termination fee fees are allowed as an administrative expense claim against the estate if they satisfy the standard of section 503(b)(1). In re Tropea, 352 B.R. 766, 768 (Bankr. N.D.W.Va. 2006). Thus, the fee must reflect the actual and necessary cost of preserving the estate. See 11 U.S.C. § 503(b)(1). See also In re Tropea, 352 B.R. at 768. In Calpine Corp. v.

O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.), 181 F.3d 527 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit explained how the section 503(b)(1) standard applied to termination fees. The Third Circuit Court of Appeals held that even though bidding incentives are measured against a business judgment standard in non-bankruptcy transactions, the administrative expense provisions of Bankruptcy Code section 503(b) govern in the bankruptcy context. Accordingly, to be approved, bidding incentives must provide some postpetition benefit to the debtor's estate. See id. at 533; see also In re Lamb, 2002 WL 31508913 (Bankr. D. Md. 2002) (implicitly adopting the administrative expense standard set forth in O'Brien).

43. The O'Brien Court identified at least two instances in which bidding incentives may provide benefit to the estate. First, benefit may be found if "assurance of a break-up fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." Id. at 537. Second, when the availability of bidding incentives induce a bidder to

research the value of the debtor and submit a bid that serves as a minimum or floor bid on which other bidders can rely, "the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth."

Id.

44. Here, the Seller seeks authority to pay the Termination Fee in the event that the Purchaser is not ultimately the Successful Bidder. The proposed Termination Fee is appropriate under Bankruptcy Code section 503 as it is fair and reasonable in amount, particularly in view of the efforts that will have to be expended by the Purchaser. Moreover, the Agreement, including the Termination Fee provided for therein, will enable the Seller to secure an adequate floor for an auction and, thus, insist that competing bids be materially higher or otherwise better than the purchase price pursuant to the Agreement (as incorporated in the Initial Minimum Overbid requirement), a clear benefit to the Seller's estate.

45. In sum, the Seller's ability to offer the Termination Fee enables it to ensure the Sale of the



Property to a contractually-committed bidder at a price that they believe to be fair while, at the same time, providing them with the potential of even greater benefit to the estates.

46. Thus, the Termination should be approved.

**IV. THE PURCHASER OR SUCCESSFUL BIDDER SHOULD BE AFFORDED THE PROTECTIONS OF SECTION 363(m) OF THE BANKRUPTCY CODE AND THE TRANSACTIONS CONTEMPLATED BY THE AGREEMENT SHOULD CARRY THE PROTECTIONS OF SECTION 363(n) OF THE BANKRUPTCY CODE.**

47. Section 363(m) of the Bankruptcy Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of Leases does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). While the Bankruptcy Code does not define "good faith," the Fourth Circuit Court of Appeals has "adopt[ed] the traditional equitable definition that has been adopted by various courts of appeal: 'one who purchases the assets for value, in good faith, and

without notice of adverse claims.'" Willemain v. Kivitz,  
764 F.2d 1019, 1023 (4th Cir. 1985)(citations omitted).

48. Section 363(n) of the Bankruptcy Code  
further provides, in relevant part, that:

The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount.

49. The Seller submits, and will present evidence at the Sale Hearing, that the Agreement reflects an negotiated, arm's length transaction. Throughout the negotiations, the Purchaser has at all times acted in good faith. Moreover, to the extent that the assets are sold to a Successful Bidder, it will be because of a well-planned competitive process and negotiations at arm's length to be conducted at an auction. As a result of the foregoing, the Seller requests that the Court make a finding that the Purchase Price to be paid by the Purchaser or the Successful

Bidder constitutes reasonably equivalent value and fair consideration under any applicable law.

50. The Seller, therefore, requests that this Court make a finding that the Purchaser or the Successful Bidder, as the case may be, has purchased the Property in good faith within the meaning of section 363(m) of the Bankruptcy Code. Further, the Seller requests that this Court make a finding that the Agreement or any purchase agreement reached as a result of the bidding procedures necessarily will comprise an arm's length, negotiated transaction entitled to the protections of section 363(m) of the Bankruptcy Code. Because the Seller has shown that the Purchaser's or Successful Bidder's bid is not the product of fraud or collusion between the Purchaser or Successful Bidder and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders, the Seller furthers request that this Court make a finding that the transactions contemplated by the Agreement are not avoidable under section 363(n) of the Bankruptcy Code.

**V. THE SALE OF THE PROPERTY AND ASSIGNMENT THE LEASES  
FREE AND CLEAR OF ALL INTERESTS SHOULD BE  
AUTHORIZED UNDER BANKRUPTCY CODE SECTION 363(f).**

51. To facilitate a sale of the Property, the Seller requests authorization to sell the Property and the Leases free and clear of any and all Liens that may be asserted against such property.

52. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell property free and clear of any interest in such property if, among other things:

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute;  
or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

53. Section 363(f) permits the sale of estate property free and clear of interests if any one of the

five conditions above is met. See, e.g., In re Laines, 352 B.R. 410, 414-15 (Bankr. E.D. Va. 2005).

54. Courts have held that the authority of a debtor to sell assets free and clear of interests is broad and should be read expansively. See In re TWA, Inc., 322 F.3d 283, 289 (3d Cir. 2003); see also United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 582 (4th Cir. 1996) (holding that the phrase "any interest in property" includes more than just in rem interests); In re P.K.R. Convalescent Centers, Inc., 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) ("As the plain meaning of the statute demonstrates, § 363 covers more situations than just sales involving liens."). Moreover, courts have noted that the purpose of the "free and clear" language is to allow the debtor to obtain a maximum recovery on its assets in the marketplace. See In re TWA, Inc., 2001 Bankr. LEXIS 723, at \*8-\*10 (Bankr. D. Del. Mar. 27, 2001).

55. Accordingly, this Court should authorize the Seller to sell the Property and the Leases free and clear of any and all Liens that may be asserted by any

parties, with any such Liens attaching to the net proceeds of the sale of the Property and the Leases in the same order and priority and subject to the same defenses as they exist against the Property and the Leases.

**VII. APPROVAL OF ASSUMPTION AND ASSIGNMENT OF THE LEASES  
IS WARRANTED UNDER BANKRUPTCY CODE SECTION 365.**

56. Under section 365(a) of the Bankruptcy Code a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor. It provides:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of the assumption of such contract or lease, the trustee -

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for

any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

57. Section 365(f)(2) of the Bankruptcy Code provides that:

The trustee may assign an executory contract or unexpired lease of the debtor only if -

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

58. First, the Seller does not believe it is in default under the either of the Leases. However, to the extent that any defaults exist under the Leases that are to be assumed and assigned in connection with the Sale, the Debtors (or the Successful Bidder) would cure any such default.

59. Second, Courts give the phrase "adequate assurance of future performance" a "practical, pragmatic

construction." EBG Midtown S. Corp. v. Mcharen/Hart  
Envtl. Eng'g Corp. (In re Sanshoe Worldwide Corp.), 139  
B.R. 585, 592 (S.D.N.Y. 1992), aff'd, 993 F.2d 300 (2d  
Cir. 1993) (presence of adequate assurance should be  
"determined under the facts of each particular case").  
Adequate assurance does not require a debtor to provide  
a guarantee of future performance; assurance is deemed  
adequate as long as performance is more probable than  
not. See Cinicola v. Scharffenberger, 248 F.3d 110, 120  
n. 10 (3d Cir. 2001) ("Although no single solution will  
satisfy every case, the required assurance will fall  
considerably short of an absolute guarantee of  
performance." (quotations and citations omitted)); In re  
Weirton Steel Corp., 2007 WL 2021896 at \*5 (Bankr. N.D.  
W. Va. July 6, 2007) ("Assurance is adequate if  
performance is likely; that is more probable than not.").

60. Adequate assurance is generally  
associated with assurance that the assignee, as tenant,  
will perform payment obligations under the lease being  
assigned. Here however, the Purchaser will be assigned  
the obligations of the Seller as lessor, which are far  
more limited than those of assignee as tenant. There



will be little practical change under the Leases as far as the Tenants are concerned. Consequently, the financial wherewithal and diligence required to negotiate and enter into the Agreement for the Sale of the Property and the Assignment of the Leases and that the Purchaser shall guarantee full and complete performance of all obligations under the Leases on and after the date of the Sale satisfy the standard set by the Bankruptcy Code.

**VIII. WAIVER OF THE TEN-DAY STAY PROVIDED BY BANKRUPTCY RULE 6004 SHOULD BE WAIVED FOR ANY ORDER APPROVING THE SALE OF THE PROPERTY.**

61. Bankruptcy Rule 6004(h) provides that: "[a]n order authorizing the use, sale, or lease of property of the estate is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h).

62. The Seller requests that the Court waive the ten-day stay of Bankruptcy Rule 6004 with respect to the Sale of the Property and Assignment of the Leases following the entry of the Sale Order. By waiving such requirements, the Seller and the Purchaser or the Successful Bidder, as applicable, will be able to

immediately close the Sale, which will result in immediate proceeds to the Seller's estate.

63. Accordingly, the stay under Bankruptcy Rule 6004(h) should be waived.

**NOTICE**

64. Notice of this Motion has been provided to those parties entitled to notice under the Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management, and Administrative Procedures (D.I. 130; the "Case Management Order"), as well as (a) all entities known to have expressed an interest in a transaction regarding the Property during the past three (3) months; and (b) all entities reasonably known to have a Lien on the Property; and (c) all federal, state, and local regulatory or taxing authorities or recording offices that have a reasonably known interest in the relief requested by the Motion. The Seller submits that, under the circumstances, no other or further notice need be given.

**WAIVER OF MEMORANDUM OF LAW**

65. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Motion and all applicable authority is set forth in the Motion, the Seller requests that the requirement that all motions be accompanied by a separate memorandum of law be waived.

**NO PRIOR REQUEST**

66. No previous request for the relief sought herein has been made to this Court or any other court.

**CONCLUSION**

WHEREFORE, the Seller respectfully request that the Court (i) enter an Order, substantially in the form annexed hereto, granting the relief requested herein, and (ii) such other and further relief as may be just and proper.

Dated: June 2, 2009

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